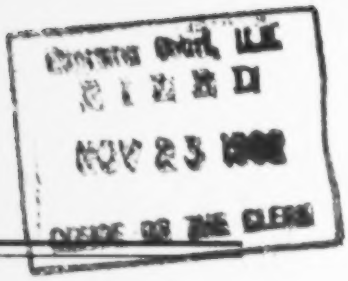

No. 92-687

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

WILLMAR ELECTRIC SERVICE, INC.
Petitioner

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF IN OPPOSITION TO PETITION
FOR WRIT OF CERTIORARI

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November 23, 1992

QUESTIONS PRESENTED

1. Should certiorari be denied as to the question whether a paid union organizer working for an employer he is attempting to organize is an "employee" of that employer, where there is no evidence in this record that the organizer in question would have continued to be paid or employed by his union if Petitioner had hired him?

2. Should certiorari be denied as to the question whether an assumed disloyalty on the part of a union organizer *could* constitute a non-discriminatory reason for refusing to hire him, where Petitioner offered no proof that this was its actual reason for refusing to hire the organizer, and where Petitioner failed to challenge the finding of the National Labor Relations Board that its actual reason was union animus?

3. Should certiorari be denied where the Court of Appeals correctly decided that employers under the National Labor Relations Act may not attempt to maintain work places free from union organizing activity by discriminatorily refusing employment to persons, otherwise qualified, who have been, and may continue to be, paid union organizers?

LIST OF PARTIES

In addition to the parties whose names appear in the caption of the case in the Petition, Interveners International Brotherhood of Electrical Workers, Local Union No. 46 ("the Union"), and Michael C. Hendrix are also parties to this proceeding.

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A. *In the court below, Petitioner failed to challenge the Board's finding that its motivation for refusing to hire Michael Hendrix was union animus. Petitioner is therefore barred from arguing that a different motivation of which it offered no proof–a fear that Hendrix would be a disloyal employee–could have constituted a non-discriminatory reason for refusing to hire him* 10

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No. 92-687

IN THE

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OCTOBER TERM, 1992

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW, JURISDICTION AND STATUTES INVOLVED

Interveners hereby adopt the statements of Petitioner concerning the opinions below, jurisdiction and statutes involved.

STATEMENT OF THE CASE

Interveners hereby adopt the statement of the case made by Respondent in its Brief in Opposition. Interveners wish to supplement that factual recitation, however, in one respect.

Interveners stress that the uncontroverted testimony of Michael Hendrix before the National Labor Relations Board ("the Board") established that he would not have remained an employee of the Union if Petitioner had hired him. Thus, the main issue on which Petitioner urges this Court to grant certiorari–the issue of dual employment by a union and another employer–is not presented by the facts of this record. Mr. Hendrix testified as follows:

> Q. You would be quitting your position [with the union]?
>
> A. I'd be going into the field to organize actually on the job.
>
> Q. Okay, but retaining your employment by IBEW Local 46?
>
> A. *I would not be employed, no. By the time I went to work for them, I would probably cease getting employment money. I would still retain the title of field organizer.*

J.A. 34 (emphasis added).[1]

> Q. Now I assume from your testimony that field organizing was a full-time position.

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[1] All references to "J.A." are to the Joint Appendix filed with the Court of Appeals in this matter.

A. Well basically, yeah, it's more than full time.

Q. And part of that full-time position is to work for employees–or, excuse me–employers?

A. *If I got hired, I would be. Like I say, the money would stop. My checks would stop from the IBEW and I would be working for–for work produced for the employer, I would be getting paid for what I produced for the employer at that time. They would become my employer at that time.*

Q. Okay. Now you were being paid $21 an hour by–and perhaps still are–by the IBEW. Isn't that correct?

A. Yes, sir.

Q. Would the IBEW in that situation compensate you for any shortfall in your compensation?

A. I don't know.

Q. Did you discuss this with anybody?

A. No.

Q. You assumed that you would be paid at a lower wage rate?

A. I was prepared to take that wage rate.

J.A. 37-38 (emphasis added).

> Q. Okay. What I'm wondering is, you said that obtaining employment was part of your responsibilities or duties as a field organizer. Did I get that wrong?
>
> A. It was part of them. I applied while I was working under employment for Local 46.
>
> Q. Was to go out and seek employment with non-union employers?
>
> A. That's possibly part of the job.
>
> Q. It is. But apparently, or you're not sure whether it's part of the compensated job.
>
> A. *Yeah. Well, like I say, I would have to take a leave of absence from Local 46 while I was working for Willmar Electric. They would cease me on the payroll at that time, I am sure. But I say, like I don't know. I never–I haven't crossed that.*

J.A. 39-39A (emphasis added).

REASONS FOR DENYING THE WRIT OF CERTIORARI

I. CERTIORARI SHOULD BE DENIED BECAUSE THE FIRST QUESTION URGED BY PETITIONER IS NOT PRESENTED BY THE FACTS OF THIS RECORD.

Petitioner eloquently asserts the importance of the question whether a paid union organizer seeking employment in a work place he intends to organize is an "employee" protected from discrimination in hiring under the National Labor Relations Act ("the Act"). However, Petitioner ignores the fact that this question is not presented by the facts of record.

A. *Petitioner Urges This Court To Decide Whether A Paid Union Organizer Is An "Employee" Within The Meaning Of Section 2(3) Of The National Labor Relations Act. However, The Record Contains No Evidence That Michael Hendrix Would Have Continued To Be Paid Or Employed By The Union If He Had Been Hired By Petitioner.*

Michael Hendrix testified at the hearing in this matter that his employment with the Union would cease, he would take a leave of absence, and he would be taken off the Union's payroll, in the event he was hired by Petitioner. When pressed on cross examination as to whether the Union would reimburse or compensate him in any way, despite his being off the regular payroll, Mr. Hendrix testified that he did not know.

Because the record is so important to the determination whether this is an appropriate vehicle for deciding the question presented, Interveners have quoted at length from the testimony of Michael Hendrix in the Statement of the Case. From this uncontradicted testimony, it is clear there is simply no affirmative evidence Mr. Hendrix would have remained employed or paid by the Union if he had obtained employment as an electrician with Petitioner. Although Mr. Hendrix testified that it was part of his job duties with the Union to *seek* employment with non-union employers, he testified that his employment with the Union would cease once he *obtained* such outside employment. He also informed Petitioner that he would confine his organizing activities to lunch time and after work. J.A. 52-53, 146, 245. The Board correctly summarized the record when it stated:

> Hendrix's uncontroverted testimony is that: he received no specific direction from the Union to seek employment with the Respondent; if hired by the Respondent, he would have to take a leave of absence from employment by the Union; he would limit any organizational activity to personal time at lunch and after work; he would not receive direction from the Union during hours of work for the Respondent; he was willing to take a reduction in pay to work for the Respondent; and he did not know whether the Union would reimburse him for any shortfall in compensation. *In sum, although Hendrix clearly intended to serve the Union's organizational interests as an employee of the Respondent, there is no affirmative evidence that Hendrix planned to remain concurrently employed, directed, or compensated by the Union for time spent working for the Respondent.*

Pet. App. A2 (emphasis added).[2] The asserted problem of "dual employment" by adversary employers, of which Petitioner complains, Pet. 11-13, is simply not present in the facts of record.[3]

By contrast, In each of the four decisions cited by Petitioner as creating a conflict among the circuits, it was clearly established that the organizer continued to be employed by and/or receive money from the union while simultaneously employed by the respondent employers. *Escada (USA) Inc.*, 304 NLRB No. 109, *enforced without opinion*, 970 F.2d 898 (3rd Cir. 1992) (organizer employed by union and paid salary and benefits by union); *H.B. Zachry Co. v. NLRB*, 886 F.2d 70 (4th Cir. 1989) (applicant for employment would have remained employed and supervised by the union if hired by respondent employer, and would have continued to receive salary and benefits from union);[4] *NLRB v. Henlopen Mfg. Co., Inc.*, 599 F.2d 26 (2nd Cir. 1979) (union organizer paid $50 per week by union while working for respondent employer);

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[2] All references to "Pet. App." are to the Appendix to the Petition for Writ of Certiorari in this matter.

[3] As the Court of Appeals noted, this question applies equally to applicants for employment as to employees already hired. "Applicants for employment are considered 'employees' under the Act. See *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177 (1941)." Pet. App. A4.

[4] *H.B. Zachry* is distinguishable from the present case for another reason as well. In *H.B. Zachry*, the court expressly excluded from its holding any case in which "a company...has a policy of accepting applicants already fully employed, yet then rejects an applicant because he is fully employed by a union." 886 F.2d at 75.

In the present case, Petitioner hired two electricians knowing that they were employed in their own electrical contracting businesses, and that one of them might leave before the conclusion of Petitioner's job in order to resume his own business. (He ultimately did leave, but was hired back by Petitoner later.) J.A. 147-48, 167-69, 174. None of these facts prevented Petitioner from hiring the two electricians. Only in Mr. Hendrix's case does Petitioner assert that his alleged outside employment prevented him from becoming its employee.

NLRB v. Elias Bros. Big Boy, Inc., 327 F.2d 421 (6th Cir. 1964) (union organizer paid $15 per week by union to cover organizing expenses while working for respondent employer).

Unlike the cases cited above, the case at bar does not present a proper record on which to decide the question urged by Petitioner, i.e., whether a *paid employee of a union* working for an employer he is trying to organize is an "employee" of that employer under the Act. The Court of Appeals chose to reach this issue by focussing on the fact that *before* Mr. Hendrix would have begun his employment with Petitioner he was employed by the Union, and *after* Petitioner's construction project finished he might again be employed by the Union. However, the Board found that Mr. Hendrix would *not* have remained an employee of the Union *during* the period he was employed by Petitioner. Pet. App. A13. Although the Circuit Court did not overturn this finding, it reached the issue in question by stating vaguely that Mr. Hendrix "plan[ned] to retain some kind of employment affiliation with the union" during the period he would work for Petitioner. Pet. App. A2. The nature of this employment affiliation was characterized by the court as nothing more than "his retention of a vague union title". Pet. App. A4.

Although Interveners agree with the holding of the court below, and have not petitioned for certiorari, Interveners believe it was unnecessary on the present record to reach the issue in question.

Petitioner argues that a union organizer who maintains dual employment for a union and another employer necessarily abandons employment for the other employer. However, the common law definition of dual employment cited by Petitioner (and the Court of Appeals) states that dual employment exists only where a person serves two masters "at one time as to one act." Restatement (Second) of Agency § 226 (1958); Pet. 11-12; Pet. App. A6. In the present case, Mr. Hendrix pledged to confine his organizing activities to the lunch

hour and after work–times that belong to Mr. Hendrix alone and during which Petitioner would have no right to control his activities. Thus, Mr. Hendrix would not have served two masters "at one time as to one act." The question of dual employment simply does not arise here.

Because Mr. Hendrix would not have remained a union employee while employed by Petitioner, and the question of dual employment does not arise, this case is a garden variety union discrimination case under section 8(a)(3), as the Board found. Such a case presents no issues of importance warranting the Supreme Court's exercise of discretionary review.[5]

II. CERTIORARI SHOULD BE DENIED AS TO PETITIONER'S SECOND ARGUMENT BECAUSE PETITIONER FAILED TO PROVE THE FACTS UNDERLYING THAT ARGUMENT, AND FAILED, IN THE COURT OF APPEALS, TO CHALLENGE THE BOARD'S FINDING TO THE CONTRARY.

This Court should decline to grant certiorari to consider Petitioner's second argument for the same reason the Court of Appeals declined to consider it: Petitioner failed to prove the facts underlying the argument and failed to challenge the Board's finding to the contrary.

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[5] It is likely that another case will arise and provide this Court with an opportunity to resolve the issue in question. The issue has been a frequent subject of litigation both in the Circuit Courts (as evidenced by the five cases that have already arisen on the issue) and at the Board level. See, *e.g.*, *Pilliod of Mississippi, Inc.*, 275 NLRB 799, 811 (1985); *Palby Lingerie, Inc.*, 252 NLRB 176, 182 (1980); *Margaret Anzalone, Inc.*, 242 NLRB 879, 888 (1979); *Lyndale Mfg. Corp., Inc.*, 238 NLRB 1281, 1283, n. 3 (1978); *Oak Apparel, Inc.*, 218 NLRB 701 (1975); *Dee Knitting Mills, Inc.*, 214 NLRB 1041 (1974), enf'd. mem. 538 F.2d 312 (2nd Cir. 1975). (The Board has consistently held in these cases that a paid union organizer working for another employer *is* an "employee" of that employer within the meaning of Section 2(3).)

A. *In the court below, Petitioner failed to challenge the Board's finding that its motivation for refusing to hire Michael Hendrix was union animus. Petitioner is therefore barred from arguing that a different motivation of which it offered no proof–a fear that Hendrix would be a disloyal employee–could have constituted a non-discriminatory reason for refusing to hire him.*

The Board made two rulings regarding Michael Hendrix. First, that he was an "employee" within the meaning of Section 2(3) of the Act, and, second, that Petitioner's refusal to hire him was motivated by union animus, in violation of Section 8(a)(1) and (3) of the Act. Pet. App. A13.

As to the question of union animus, Petitioner presented evidence at the hearing that even in the absence of Mr. Hendrix's union activities, it would not have hired him because: (1) it did not take his application seriously, and (2) he had written on the application "Journeyman-Foreman Electrician", and no foreman positions were available. The Board found these reasons unproven and insufficient to overcome the General Counsel's showing of union animus under the dual motivation test of *Wright Line*, 251 NLRB 1083, 1089 (1980).[6] Pet. App. A39.

In the Court of Appeals, Petitioner challenged the Board's first ruling, arguing that Mr. Hendrix was not an "employee" within the meaning of the Act. However, Petition-

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[6] In *Wright Line*, *supra*, 251 NLRB at 1089, the Board stated:

> [We] shall henceforth employ the following causation test in all cases alleging violation of Section 8(a)(3) or violations of Section 8(a)(1) turning on employer motivation. First, we shall require that the General Counsel make a prima facie showing sufficient to support the inference that protected conduct was a "motivating factor" in the employer's decision. Once this is established, the burden will shift to the employer to demonstrate that the same action would have taken place even in the absence of protected conduct.

er failed to challenge the Board's second ruling, that its refusal to hire Mr. Hendrix was motivated by union animus under the *Wright Line* test. Pet. App. A2.

Instead, Petitioner argued that a different motivation–one of which it offered no proof in the administrative hearing–could constitute a non-discriminatory reason for denying Mr. Hendrix employment. Petitioner argued that it was entitled to assume that Mr. Hendrix, because he was a union organizer, would be a disloyal employee.

The problem with this argument, as the Court of Appeals pointed out, is that even if we assume such a motivation could be considered non-discriminatory, Petitioner failed to prove that fear of disloyalty was, *in fact*, its motivation for denying Mr. Hendrix employment. Pet. App. A6-A7. Petitioner likewise failed to challenge the Board's finding to the contrary. Pet. App. A2. "It is the 'true purpose' or 'real motive' in hiring or firing that constitutes the test" for whether the employer's action was discriminatory. *Teamsters Local 357 v. NLRB, 365 U.S. 667, 675 (1961) (quoting Radio Officers' Union, C.T.U. v. NLRB, 347* U.S. 17, 43 (1954)). "[T]he actual motivation of the company decision-maker, not the objective circumstances that may or may not be known to him at the time, will determine the outcome of a case." *NLRB v. Pfizer, Inc.*, 629 F.2d 1272, 1275 (7th Cir. 1980). A theoretical argument cannot substitute for proof of Petitioner's "real motive" in this case.[7]

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[7] The testimony in this case makes it evident that fear of disloyalty was not, in fact, a concern of Petitioner in selecting its electricians. Petitioner hired two electricians who simultaneously were operating their own–and potentially competing–electrical contracting businesses. J.A. 147-48, 167-69, 174.

Furthermore, Petitioner denied employment to at least eight other electricians whose applications indicated they were union members, despite the fact that none of them were union organizers or employees like Mr. Hendrix. Pet. App. A26-A27, A33-A41. One of them, Allen Haugen, was also the subject of discrimination charges that were upheld by the Board.

In effect, Petitioner seeks a *per se* rule that all paid union organizers may be assumed disloyal, so that an employer need not prove that its actual motivation for refusing to hire the organizer was a fear of disloyalty, as opposed to union animus. There is a vast difference between acts of disloyalty (such as sabotage, disclosure of confidential information, aiding a competitor, or disparaging an employer's product) and union activities (such as soliciting authorization card signatures, campaigning in a representation election, or urging an employer to stop anti-union activities). *See, NLRB v. Electrical Workers (IBEW) Local 1229 (Jefferson Standard Broadcasting Co.)*, 346 U.S. 464, 474-75 (1953); *Texaco Inc. v. NLRB*, 462 F.2d 812, 814 (3rd Cir.), *cert. denied*, 409 U.S. 1008 (1972). An employer's refusal to hire a union organizer may be motivated by a dislike of the latter activities rather than a fear of the former. There can be no *per se* rule as to an employer's motivation.

An assumption that union organizing activity will entail acts of disloyalty would completely undermine the purposes and protections of the National Labor Relations Act. Union organizing is protected activity under Section 7[8] and may not be equated with disloyalty. *See, Jefferson Standard Broad-*

Pet. App. A40-A41. (Petitioner did not challenge the Board's decision as to Mr. Haugen.) The fact that all other union members who applied were denied employment indicates that union animus, rather than a fear of disloyalty on Mr. Hendrix's part, motivated the denial of employment to Mr. Hendrix.

[8] Section 7 provides, in pertinent part: "Employees shall have the right to self-organization, to form, join, or assist labor organizations..." 29 U.S.C. § 157.

casting, supra.[9] A union organizer who takes a job with the underlying purpose of unionizing a work place can loyally serve the employer's interest in producing its goods or services. *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 182 (1941).[10] This is the *legitimate* employer interest that our labor laws protect. They do not protect the kind of interest Petitioner seeks to protect–that of having a work place free of union organizers.

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[9] In *Jefferson Standard Broadcasting*, the employer discharged 10 workers for distributing handbills that made a sharp, public, disparaging attack on the company's product and its business policies. *Jefferson Standard Broadcasting*, 346 U.S. at 471. One of the 10 workers was found to have neither sponsored nor distributed the handbills. This Court emphasized the importance of distinguishing between protected union activity and acts of disloyalty, as follows:

> The courts have refused to reinstate employees discharged for "cause" consisting of insubordination, disobedience or disloyalty. In such cases, it often has been necessary to identify individual employees, somewhat comparable to the nine discharged in this case, and to recognize that their discharges were for causes which were separable from the concerted activities of others whose acts might come within the protection of § 7. It has been equally important to identify employees, comparable to the tenth man in the instant case, who participated in simultaneous concerted activities for the purpose of collective bargaining or other mutual aid or protection but who refrained from joining the others in separable acts of insubordination, disobedience or disloyalty.

Jefferson Standard Broadcasting, supra, 346 U.S. at 474-475.

[10] *Phelps Dodge* held that an applicant for employment may not be denied a job because of his union affiliation. This Court stated that under the National Labor Relations Act, the vital national purpose of eliminating obstructions to the free flow of commerce

> was to be accomplished 'by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association'. Sec. 1. Only thus could workers ensure themselves economic standards consonant with national well-being. *Protection of the workers' right to self-organization does not curtail the appropriate sphere of managerial freedom; it furthers the wholesome conduct of business enterprise.*

Phelps Dodge, 313 U.S. at 182 (emphasis added).

Petitioner's legitimate interest in producing its goods and services is protected by its right to discharge or refuse to hire an individual who has sabotaged operations, disparaged a product, aided a competitor, or disclosed confidential information.[11] Absent proof that an employer acted out of a well-founded fear that a particular union organizer, if hired, would engage in such acts of disloyalty, it cannot be assumed that this was the employer's motivation.

Having failed to offer proof of the motivation for which it now contends, and having failed to challenge the Board's finding to the contrary, Petitioner may not now obtain certiorari on this issue. Petitioner has waived the issue. *Sparks Nugget v. NLRB*, 968 F.2d 991 (9th Cir. 1992) (failure to contest Board findings in the court of appeals constitutes waiver).

III. CERTIORARI SHOULD BE DENIED BECAUSE THE COURT OF APPEALS FULLY CONSIDERED AND CORRECTLY DECIDED THAT A PAID UNION ORGANIZER EMPLOYED IN A WORK PLACE HE IS ATTEMPTING TO ORGANIZE IS AN "EMPLOYEE" PROTECTED FROM DISCRIMINATION IN THAT WORK PLACE UNDER THE NATIONAL LABOR RELATIONS ACT.

A final reason for this Court to deny certiorari is that the Court of Appeals fully considered and correctly decided the issue in question, though Interveners believe it was unnecessary to reach the issue.

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[11] An individual may also be discharged for violating a plant rule, such as a non-discriminatory rule against solicitation during work hours.

A. *A Paid Union Organizer Working For An Employer And Attempting To Organize That Employer's Work Force Does Not, Merely By His Status As A Union Employee, "Abandon" Employment For The Employer.*

The court below correctly held that

> [u]nder common law principles "[a] person may be the servant of two masters, not joint employers, at one time as to one act, if the service to one does not involve abandonment of the service to the other." Restatement (Second) of Agency § 226 (1958); *Kelley v. Southern Pacific Co.*, 419 U.S. 318, 324 (1974) (recognizing that under the common law a servant can have two masters in a variety of relations); *Dellums v. Powell*, 566 F.2d 216, 222 n. 22 (D.C. Cir. 1977) (same). Until such time as an employee "abandons" the non-union employer for the union employer, it is hard to see why he should be denied the protection of the Act.

Pet. App. A6.

Petitioner argues that the adversity of interest that exists between a union organizer and a non-union employer necessarily results in the organizer "abandoning" work for that employer, even if he is performing his job duties in an excellent manner and confining his organizing activity to non-working hours. Petitioner argues in a similar vein that an

intent to serve the union necessarily excludes an intent to serve the other employer.[12]

As this Court has recognized, the "plain meaning" of the term "employee" in Section 2(3) extends to the broad class of individuals "who work for another for hire." *Chemical Workers v. Pittsburgh Glass*, 404 U.S. 157, 166 (1971). If hired by Petitioner, Mr. Hendrix would have performed labor as an employee, at Petitioner's workplace, alongside Petitioner's other employees, under Petitioner's direction and control, for Petitioner's profit, and in return for wages from Petitioner. Given these facts, it would simply rob the term "employee" of its plain meaning to conclude that Mr. Hendrix is other than an "employee."

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[12] Interestingly, Petitioner assumes in its discussion that the outside employer will always be a *non-union* employer. Whatever force its overall argument might have in that situation–and Interveners concede none–it has, if possible, even less force where the employer is already unionized and the organizer is from a rival union. There, the only conflict of interest that exists is between the incumbent union and the rival union. Yet under Petitioner's rule, the rival union organizer would not be considered an "employee" of the employer under the same misguided "conflict of interest" theory that Petitioner has devised for the non-union situation.

Petitioner's misguided theory would also be applicable to the case where an employer discharges a worker for protected union activity *without knowing* that the worker is actually a paid union organizer. This is exactly what occurred in *Escada (USA), Inc., supra*, 304 NLRB No. 109, *enf'd w/o opinion*, 970 F.2d 898 (3rd Cir. 1992). Under Petitioner's theory, regardless of how unlawful an employer's actions and motives might be, the employer is immunized from liability under the Act by the fortuity of the worker's status as a paid organizer. This would allow employers to circumvent the principle expressed *infra*, p. 12 that it is the "true purpose" or "real motive" of an employer that determines whether its hiring or firing decision is discriminatory.

Section 2(3) contains seven specific exclusions from its definition of "employee."[13] Under the well-established canon of statutory construction *expressio unius est exclusio alterius*, the enumeration of exclusions in the definition of "employee" indicates that it includes all cases not specifically excluded. This Court applied precisely this analysis when confronted with the issue of whether undocumented aliens should be considered "employees" within the meaning of Section 2(3), reasoning: "Since undocumented aliens are not among the few groups of workers expressly exempted by Congress, they plainly come within the broad statutory definition of 'employee.'" *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 892 (1984).

As a matter of policy, Petitioner's argument turns our national labor policy on its head. Our labor laws presume and protect precisely the kind of adversity of interest that Petitioner would eliminate. A union organizer's goal to organize the work force is in no way inimical to an employer's interest in producing its products or services. *See, Jefferson Standard Broadcasting, supra*, 346 U.S. at 474-75; *Phelps Dodge, supra*, 313 U.S. at 182. It is this legitimate interest of employers

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[13] Section 2(3), set forth in its entirety, provides:

> The term "employee" shall include any employee, and shall not be limited to the employees of a particular employer, unless the Act explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, but shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse, or any individual having the status of an independent contractor, or any individual employed as a supervisor, or any individual employed by an employer subject to the Railway Labor Act, as amended from time to time, or by any other person who is not an employer as herein defined.

29 U.S.C. § 152(3).

that our labor laws protect–not an employer's interest in keeping union organizers out of its work force.

Petitioner's argument proves too much. It is equally applicable to volunteer union organizers as to paid union organizers. The same adversity and "conflict of interest" may exist between the employer's desire to avoid unionization and the organizer's desire to foster it. Petitioner alleges no other conflict. Surely Petitioner would not argue that a volunteer union organizer in its work force is not its "employee" and may be discharged for union activities without regard to the prohibitions of Section 8(a)(3) of the Act.

B. The Lechmere And Babcock Decisions, Which Protect Employer Private Property Against Entry By Non-employees, Do Not Permit Employers To Discriminate In Hiring As A Way To Ensure That Certain Persons Never Become Employees And Never Gain Access To Their Property.

This Court's decisions protecting employer private property rights in *Lechmere, Inc. v. NLRB*, 112 S. Ct. 841 (1992) and *NLRB v. Babcock & Wilcox Co.*, 351 U.S. 105 (1956) do not, of course, override the statutory prohibitions against anti-union interference and discrimination contained in Sections 8(a)(1) and (3) of the Act. On the contrary, *Lechmere* and *Babcock* expressly ensure protection of those statutory rights: an employer may not ban non-employee *union* solicitors unless it also bans non-employee solicitors of *all* types from its property. To do otherwise would constitute discrimination.

Petitioner attempts to turn *Lechmere* and *Babcock* into judicial overrides of the statutory prohibition against discrimination. Petitioner argues that forcing employers to hire, or continue to employ, otherwise-qualified union organizers, would render ineffective the protection offered to em-

ployers by *Lechmere* and *Babcock*. However, those decisions in no way license employers to discriminate in *hiring* as a way to ensure that certain persons never *become* employees and never gain access to their property. (Nor do they allow employers to discriminate in *firing* in order to ensure that certain persons do not *remain* their employees and continue to have access to their property.) Unfortunately for Petitioner, the requirements of Section 8(a)(3) do impinge somewhat on its desire to exercise the degree of control over its private property necessary to exclude all union "infiltration". Pet. App. A19. To insulate itself from union "infiltration" while remaining within the precepts expressed in *Lechmere* and *Babcock*, an employer would have to take the absurd step of denying employment to *all* non-employees, not just to non-employees who are union organizers. Only by taking this step could Petitioner exclude union organizers from its work force without discriminating against them in violation of the Act.[14]

Lechmere and *Babcock* divide the class of all persons into only two groups: "employees" and "non-employees". This Court has determined that applicants for employment, such as Mr. Hendrix, are "employees" under the act entitled to protection against discrimination. *Phelps Dodge, supra*, 313 U.S. 177. *See also, Elastic Stop Nut Div. of Harvard Ind. v. NLRB*, 921 F.2d 1275, 1280-81 (D.C. Cir. 1990); *NLRB v. Bausch & Lomb, Inc.*, 526 F.2d 817, 821 (2nd Cir. 1975). While it can be argued that Petitioner may lawfully prevent Mr. Hendrix from soliciting on its property until he is actually hired, as an applicant for employment, Mr. Hendrix is in a

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[14] In the Petition, Petitioner makes an assertion of fact having no support in the record or elsewhere. Petitioner states: "Taking the license granted by the Board to its fullest extent, unions are presently enlisting large numbers of employee/agents to infiltrate the workforces of targeted employer". Pet. 20. Interveners ask that this statement in the Petition be stricken.

protected class; Petitioner may not *permanently* relegate him to the class of non-employees for the purpose of excluding him forever from its property.

Once again, Petitioner's argument proves too much. The argument that an employer has the right to exclude union organizers from its property by refusing to hire them is equally applicable to volunteer as to paid union organizers. Nothing in *Lechmere* or *Babcock* turns on whether the solicitors in question are employed by the union or are merely volunteers. There is no greater impact on Petitioner's property rights either way.[15]

C. *The Fact That An Employee, Such As A Paid Union Organizer, May Be Ineligible To Vote If A Representation Election Is Ever Held, Does Not Mean That He May Be Denied Employment In The First Instance.*

Eligibility to vote in a representation election is the *only* issue raised by Petitioner where an organizer's paid versus unpaid status may matter at all. However, the determination that a paid organizer is an "employee" does not establish that the organizer is necessarily eligible to vote. As this Court has stated, the Board may "exclude from bargaining units persons who are statutory 'employees' otherwise protected by the Act." *NLRB v. Action Automotive, Inc.*, 469 U.S. 490, 498 (1985).

The right to vote and the right to employment without discrimination are two different rights. The court below observed:

> Hendrix's qualification as an "employee" is not the same as eligibility to vote; he could be included in a

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[15] The Court of Appeals made the same point: "That Hendrix's employment would give him a better perch from which to propagandize is true, just as it would be true for any union zealot who got a job with Willmar." Pet. App. A7.

> bargaining unit only if found to share the necessary community of interest with other workers. See, e.g., *NLRB v. Action Automotive, Inc.*, 469 U.S. 490 (1985) (employees related to owner/managers not permitted to vote). To the extent that Willmar's arguments have force, they can be raised at that stage.

Pet. App. A7.

Nothing in the Act allows employers to deny a person employment merely because someday, if a union representation election is held, that person might be found ineligible to vote. The Court of Appeals correctly held that Petitioner cannot discriminate against Mr. Hendrix on this ground.

CONCLUSION

For the foregoing reasons, Interveners pray that the Court deny the writ of certiorari.

Respectfully submitted

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